No. 43997-2-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

In Re the Marriage of

CHAD MITCHELL BURTON

Respondent,

and

DEBORAH RENEE BURTON

Appellant.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The trial court committed at least four reversible sets of errors: 1) Failure to provide a pathway for the mother to resume her role as primary custodial parent. 2) Failure to distinguish between property, maintenance, and child support, 3) Entry of numerous findings pejorative to the mother and complimentary to the father, and 4) Failure to award attorney's fees.

Respondent asserts that these errors are primarily matters of fact and well within the Court's discretion. However, most of the errors don't arise from the Court's Findings of Fact, at least its oral findings of fact. Rather, most of the Court's errors reside in the Court's Conclusions of Law. The Conclusions don't follow the facts. This was error.

II. STATEMENT OF THE ISSUES

1. **Whether the Court Should Have Given Appellant an Opportunity to Call Dr. Poppleton;**

2. **Whether the Parenting Plan Should Contain Provisions for the Mother to Resume Her Role of Primary Custodial Parent as Recommended by Both Parenting Evaluators and the Father, and Suggested by the Court Itself;**

3. **Whether the Findings of Fact Against the Mother Are Supported by Substantial Evidence;**

4. **Whether Maintenance, Child Support, and Property Division Are Three Separate Considerations and Should Be Treated as Such;**

5. **Whether the Date of Separation Should Be the Petition File Date; and**

6. **Whether the Mother Should Have Been Awarded Attorney's Fees.**

III. ARGUMENT

1. The Court Should Have Given Appellant an Opportunity to Call Dr. Poppleton.

Respondent asserts that it was Appellant's job to call Dr. Poppleton. She didn't. Therefore, according to Respondent, the absence of testimony from Dr. Poppleton falls squarely on the shoulders of Appellant and the Court is absolved of any error.

While this analysis is correct in theory, it is too harsh in practice. The Court did not have a duty to call Dr. Poppleton. However, it did have a duty to ensure a fair trial. A court ensures a fair trial by explaining the rules and procedures and then enforcing them in an even-handed manner. Here, the Court had a duty to inform Appellant of when she could call Dr. Poppleton.

The Court failed to discharge this duty. Before presenting her witnesses, while there was still time to call Dr. Poppleton, Appellant asked the court directly if she could call Dr. Poppleton "tomorrow." *RP* 155. The Court said "no."

Thus, in Appellant's mind, she was forbidden from calling Dr. Poppleton. Dr. Poppleton should have been the most important witness in the trial. Appellant expected him to testify about his recommended

parenting plan. He recommended that Appellant be given a chance to resume primary custody of the children if she made appropriate changes in her behavior. That recommendation was absolutely central to Appellant's case.

Instead of saying "no, you cannot call Dr. Poppleton tomorrow," the Court should have said: "You cannot call Dr. Poppleton *tomorrow*, but you can call him *today,* or any time before you close your case in chief." Instead, the Court promised to discuss Dr. Poppleton later:

Court: "We will discuss [calling Dr. Poppleton] when we get done with this witness."

But then, in the same statement, the Court changed the subject and discussed the availability of Mr. Day.

Court: "So did you contact Mr. Day?"

The Court then never fulfilled its promise to discuss calling Dr. Poppleton. The subject of Dr. Poppleton testifying was never raised again and the Appellant never had a chance to call her most important witness. This was error.

2. The Parenting Plan Should Contain Provisions for the Mother to Resume Her Role of Primary Custodial Parent as Recommended by Both Parenting Evaluators and the Father, and Suggested by the Court Itself.

Respondent asserts that it was within the Court's discretion to disregard the suggestion in Dr. Poppleton's report that Appellant be given

a pathway to resume primary custody of the children. While that may be true, Respondent's assertion does not squarely respond to Appellant's argument. Dr. Poppleton was not the only expert to recommend this pathway. Mr. Foster echoed Dr. Poppleton's recommendation. Appellant wholeheartedly agreed. Respondent did not disagree. Even the Court itself appeared to agree.

> Dr. Poppleton: It is recommended that once Debbie can learn to manage her emotions around the children, stop involving them in her fight with Chad and his significant other, and understand the affects her behavior has had on their anxiety and attitude toward visitation, that the time share move back to her having the children the majority of the time. The schedule noted in the original report would be appropriate once this is resolved. This process would best be facilitated by the PC and should be supported by Chad. If she cannot do it then the children might indefinitely remain with Chad. This will require measureable criterion for her to accomplish.

Poppleton Rep. 61.

Mr. Foster appears to agree with the recommendation, although his agreement is admittedly tepid and indirect.[1]

> Mr. Foster: Upon adequate progress, Mr. Burton says he believes Ms. Burton will be able to resume primary residential parenting responsibilities for the children. Should this occur, it is my recommendation that his residential time should be an enhanced version of local court rule.

Foster Rep. 11.

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[1] Mr. Foster's report and testimony is essentially silent on the issue of Appellant's role in a long term parenting plan. In addition, his written recommendation that the residential schedule be an "enhanced version of local rule" is meaningless in terms of how to transition primary residential care back to the mother. Since this was the primary issue at trial, his testimony is of little weight.

Attorney for Resp.: There is an indication in Dr. Poppleton's latest letter – well, he recommends that the children's primary care be switched and placed with Mr. Burton and that Mrs. Burton have residential time less than primary.

He also indicates the possibility that if she gets the right amount of counseling that could reverse back.

Based on the information you have from the file and the work you did and then what you've reviewed from him, what is your opinion about that?

Mr. Foster: Well, Dr. Poppleton I think will need to speak for himself about the conclusions he made in his reports.

But his reports are consistent with my predictions and my experience of Mrs. Burton.

RP 17.

Appellant: I want to remind the Court that Poppleton left it open-ended. I don't know if we could read that or find it, but Poppleton said if ... Debbie goes through these motions. I don't want that taken away from me.

RP 216.

At the hearing on May 30, after the trial, the Court itself indicated that it agreed that Appellant should be given an opportunity to resume her role of primary custodial parent.

Court: I do hope that, as indicated by Dr. Poppleton, they will take advantage of some of the counseling. The – take advantage on the parental coordinator and those types of things, and then we can work toward a more equal parenting plan.

RP 303.

The Court's hope should have been rendered into a set of concrete provisions in the parenting plan. The failure to translate this hope into a provision in the parenting plan was error. In the alternative, if the Court's expression of hope was insincere when offered or rescinded upon further reflection, it should have entered findings to that effect.

3. The Findings of Fact Against the Mother Are Not Supported by Substantial Evidence.

Respondent asserts that the findings of fact are not at issue on appeal because each one was not specifically addressed. In the alternative, Respondent asserts, even if the findings of fact are at issue, they were well within the court's discretion. Neither argument is correct.

The Findings contain four pages of single-spaced commentary on Appellant's mental fitness and parenting skills. Appellant was unable to dissect each and every finding specifically because of page limits and presumed limits on this Court's patience.

However, Appellant does have a sufficient number of pages to point out another specific example of an improper finding. Consider the following statement: "We do not believe Ms. Burton's therapist has seen the reports from either Dr. Poppleton or Jeff Foster." This is a statement of belief, not a finding. "We" is obviously not the Court. Rather, it is Respondent and his attorney speaking as if they *were* the Court. Moreover,

the entire finding is not based on the record. There was no testimony from Appellant or her therapist about what documents the therapist may have reviewed. The issue was not even raised at trial. This was error.

Moreover, the Findings do not contain a shred of information about the domestic violence and other untoward behavior expressed by the father. As Appellant mentioned in her opening brief, these findings are lop-sided and unjudicial. The Court should have stricken these findings before signing the proposed order. In the alternative, it should have written its own more balanced findings. Failure to do so was error. The error was far from harmless. Anytime Appellant is haled back into court, her credibility will be diminished because of these findings.

4. Maintenance, Child Support, and Property Division Are Three Separate Considerations and Should Be Treated as Such.

Respondent asserts that it was within the Court's discretion to only award six months of maintenance and to consider child support, maintenance, and property division as all part of the same stew. However, the Court didn't award six months of maintenance. It awarded thirty. "I figured that he should be paying maintenance for about thirty months." *RP* 308. In addition, although one can influence the other, child support, maintenance, and property division are different and need to be analyzed according to different criteria.

Here, however, the Court combined all three elements into the same stew. After giving an appropriate maintenance award with one hand, the Court took it away with the other. First, the Court asserted that Respondent had already paid 27 months of maintenance. "He has paid for 27 months." *RP* 308. This is fundamentally incorrect. Respondent did not pay 27 months of maintenance. Rather, at most, he paid 27 months of *child support*. Child support and maintenance are different beats. One may, in fact, affect the other, but it cannot completely replace the other.

Next, the Court confuses maintenance and property division. "In addition to that, I again accept his proposal that he be paying $4,500 until the asset's paid off." *RP* 308. The Court offers this comment even after correctly recognizing the distinction between property and maintenance. On the one hand, the Court stated: "He's paying her a monthly payment. I can't include that as income to her. That is her share of the community property." *RP* 306.

But then, with the other hand, the Court cited Appellant's property award as justification for her reduced maintenance award (from 30 months to six months). Respondent correctly points out that the Court may consider the property award when awarding maintenance. *Resp.* 31. However, a reduced maintenance award is only appropriate when the person receiving maintenance receives a disproportionate or unequal

property award. *Marriage of Estes*, 84 Wn.App. 586, 593 (Div. III, 1997) ("Rather than award respondent a monthly maintenance figure for an extended period of time, the court chooses a disproportionate division of the property in lieu thereof."), *Marriage of Luckey*, 73 Wn.App. 201, 210 (Div. III, 1994) ("the fact that the property division was unequal in favor of Ms. Luckey.").

5. The Date of Separation Should Be the Petition File Date.

Respondent asserts that the Court has wide discretion to establish the day of separation. In addition, Respondent appears to assert that the day of separation is immaterial. While the former assertion is correct, the latter is not. In addition, the Court's discretion is limited by law. As Respondent correctly points out, a court may not establish a day of separation until after the parties have ceased to have a community relationship. *Aetna Life Ins. Co. v. Bunt*, 110 Wn. 2d 368 (1988).

Here, the parties had a community relationship (albeit marked by domestic violence and extra-marital affairs by both spouses), until perhaps ten months after the Respondent's proposed day of separation. Indeed, the father lived in the family home, slept in and was intimate in the marital bed, and held himself out to Appellant and the world at large as seriously committed to reconciliation.

Under this fact pattern, the most appropriate day of separation would be the petition file date. Any day prior to the petition file date would have a material effect on Appellant's maintenance award. The longer the marriage, the stronger Appellant's claim to maintenance. *RCW* 26.09.090(1)(d). Any payments made prior to the day of separation would not be counted as maintenance. Rather, they would be counted as child support or undifferentiated family support and water under the bridge.

6. The Mother Should Have Been Awarded Attorney's Fees.

Respondent asserts that Appellant never properly requested attorney's fees. Rather, she merely engaged the Court in unfocused discussions about such fees. Therefore, the issue was not preserved for appeal. In the alternative, said discussion did qualify as a request for attorney's fees, but Respondent has no ability to pay such fees. Neither assertion is correct.

First, while Appellant's testimony and argument was, admittedly, inartful, disorganized, and confused, it was also, in the main, understandable. No fair-minded fact-finder could listen to Appellant's statements regarding her financial circumstances and her need for attorney's fees and conclude that she was not asking for attorney's fees. She was not in court to engage in fruitless discussions. Rather, she was in court to obtain sufficient funds to start a new life.

Second, in terms of ability to pay, Respondent had the ability to pay at least something. For example, he could have paid his thirty months of maintenance and amortized his property payments over a longer period of time. In the alternative, he could have begun his property payments after completion of his maintenance payments.

The contrast between Appellant's need and Respondent's ability to pay is striking. Using Respondent's figures, he made $10,000 / month. Using the figures from his tax returns, he made $19,000 / month. Either way, Respondent's income was at least an order of magnitude more than Appellant's. Post-decree, Appellant will have less than $1,000 / month ($4,000 in annual interest on her property settlement, *RP* 307, plus $6,000 in maintenance. *RP* 308). The funds she will receive in property settlement are not income. It is property settlement.

IV. CONCLUSION

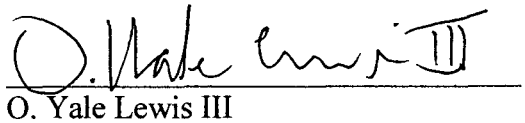
The basic error in this case is the disconnect between the Court's oral findings, written findings, and the actual orders. In the first section of its oral findings, the Court made conclusions about maintenance and property division that are within its discretion: maintenance for 30 months at $2,000 / month and a 50 / 50 property division (50% of the community business = $171,000.) Then it performed a sleight of hand and only gave Appellant $6,000 total in maintenance.

In terms of the written findings germane to the Parenting Plan, the Court simply signed the personal commentary proffered by Respondent. The Court made no such findings in its oral ruling. Therefore, it was improper for Respondent to put written findings in the Court's mouth.

It was error for the Court to sign these findings.

The Court also erred when it ignored Appellant's plaintive cries. The Court should have informed Appellant of her right to call Dr. Poppleton during her case in chief. Likewise, it should have awarded her attorney's fees for the work her attorney did pre-trial. In the alternative, it should have entered findings explaining why it did not award such fees.

Respectfully submitted, this 11th day of APRIL, 2013



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DECLARATION OF SERVICE

I, Molly Graves, hereby certify and declare under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

I am employed by the Law Offices of O. Yale Lewis III; I am over the age of eighteen (18) years; not a party to the above-entitled action; and competent to testify.

I arranged service of the *Reply Brief of Appellant* to the following court and parties on the date set forth below:

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